

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 06-0790 C

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

NEW VENTURES ASSOCIATES LLC,

AFFIDAVIT OF RICHARD J. CHALPIN

I, Richard J. Chalpin, being duly sworn, depose and say:

1. My name is Richard J. Chalpin. I am currently employed by the Massachusetts Department of Environmental Protection (the "Department" or "MassDEP") at the Department's Northeast Regional Office ("NERO"), 205B Lowell Street, Wilmington, Massachusetts 01877 as the Regional Director.
2. I hold a Masters of Science Degree in Environmental Engineering (1978) from Northeastern University and a Bachelors of Science Degree in Biology (1972) from Northeastern University.
3. As Regional Director, I manage MassDEP's environmental programs -- air pollution, hazardous waste, solid waste, emergency response, waste site cleanup, water pollution control, water supply and wetlands protection -- in the eighty-four (84) cities and towns. This includes managing, directing and overseeing the Solid Waste program where Department staff implement the solid waste statute M.G.L. Ch. 111 Sec 150A and the regulations promulgated

thereunder at 310 CMR 16.00 and 19.000 (the "Solid Waste Regulations"). The staff in the solid waste program conduct the following activities:

- a. Review, interpret and evaluate professionally prepared plans and reports as part of permit applications submitted by facilities pursuant to the Solid Waste Regulations;
 - b. Inspect solid waste management facilities;
 - c. Investigate complaints and unauthorized solid waste disposal sites and facilities;
 - d. Review and evaluate reports including environmental assessment and monitoring and self-inspection reports submitted by facilities pursuant to the Solid Waste Regulations;
 - e. Prepare written field reports;
 - f. Prepare and implement appropriate enforcement actions; and
 - g. Provide technical information and assistance to the public and regulated facilities on implementation of and compliance with the Solid Waste Regulations.
4. I have served as Regional Director since July 1, 2005 and have been employed by the Department since March 1970. Prior to serving as Regional Director, I have held several management and technical positions with the Department including Acting Assistant Commissioner, Bureau of Waste Site Cleanup (7/1/04-7/1/05) and Deputy Regional Director & Regional Engineer for the Bureau of Waste Site Cleanup (1/3/83-7/1/04).

BACKGROUND

5. New Ventures, LLC ("New Ventures") owns and operates the Crow Lane Landfill (the "Landfill"), which is located on Crow Lane in Newburyport.

6. William Thibeault is the president of New Ventures Associates and is the owner and operator of the Landfill.
7. On October 20, 2003, MassDEP and New Ventures executed a Corrective Action Standby Trust Agreement ("Trust Agreement") that established an approved Financial Assurance Mechanism ("FAM") pursuant to 310 CMR 19.051(12)(a). *See* attached Affidavit of John Carrigan, Chief of the Solid Waste Division of the Massachusetts Department of Environmental Protection's Northeast Regional Office. ("Carrigan Aff."), paragraph 25 ("¶ 25") and the Trust Agreement attached as Exhibit D to the Carrigan Aff. The FAM is required by the Commonwealth's Solid Waste regulations to assure that adequate funding is available and accessible to MassDEP in the event that New Ventures is unable or unwilling to complete all the remaining Landfill closure work or perform all the required closure and post-closure maintenance and operation activities.
8. The Final Judgment sets a schedule for the Landfill's capping and closure. New Ventures was required to complete installation of the impermeable, "flexible membrane liner" ("FML") cap for the entire Landfill by November 27, 2009. *See* Final Judgment, paragraph 12 (g). Because the final sand drainage and vegetative cover on top of the FML or other Landfill closure work cannot be completed during the winter, the Final Judgment requires that New Ventures place the drainage layer and loam and grass seed over the completed Landfill cap by May 30, 2010. *See Id.*, paragraph 12 (g).
9. The FML cover for the Landfill is required to prevent the continued exposure of the construction and demolition waste fines and residuals ("C&D Material") used at the Landfill as grading and shaping material to the atmosphere, rain and runoff infiltration. Wallboard in

C&D Material contains gypsum that, when exposed to moist, anaerobic conditions in a landfill containing organic material, breaks down and releases Hydrogen Sulfide gas.

10. In September 2009, during an inspection of the Landfill with Mr. Thibeault and Ethan Owen, a Landfill employee, Mr. Thibeault stated to me that he did not have the money to pay for the installation of the FML by the date required by the Final Judgment, November 27, 2009. Mr Thibeault then told me that, unless the Department agreed to release monies from the FAM to pay for the FML installation, the Landfill could remain uncapped all winter and he didn't care if it did. Furthermore, he stated to me that, even if he had any money, he could not get any contractors to work for him due to "his reputation". Mr. Thibeault stated that the only way contractors would work for him is if the Department guaranteed them that they would be paid with money available in the FAM account.
11. For the same reasons, Mr. Thibeault informed me that he was unable to contract for the installation of three (3) landfill gas extraction wells and associated lateral gas collection piping required in the area to be covered by FML, for blasting work necessary to create a storm water detention basin and for blasting and drainage construction for a drain line from the basin.
12. In response, I told Mr. Thibeault that, because the November 27, 2009 FML installation deadline was fast approaching, the Department needed proof as soon as possible that New Ventures did not have the funds available to pay for this work in order for the Department to consider utilizing funds from the FAM. I instructed him to submit financial documents to the Department showing that New Ventures was unable to pay for the FML installation and other activities described above. He said he would talk to his attorney about providing such

documents. As of the date of this Affidavit, Mr. Thibeault has not provided any such documents.

13. FML cannot be installed during the colder winter months. Leaving a large portion of the Landfill uncapped until the spring of 2010 would dramatically increase the risk and likelihood of rain and runoff infiltration into the exposed C&D Material resulting in the continuing release of Hydrogen Sulfide and other gasses from the Landfill. Such releases must be prevented and controlled pursuant to the Air Quality Regulations, 310 CMR 7.00, and the Solid Waste Regulations, 310 CMR 19.000, whenever possible. Such releases also threaten the health and welfare of residents living in the vicinity of Landfill and cause nuisance odor conditions.
14. The Department determined that New Ventures' purported financial inability to retain contractors and/or pay for the Landfill's FML cap and the other related activities described above in a timely manner in October 2009 threatened to prohibit completion of the FML cap before winter and would result in C&D material being exposed to the elements for many months. With the Court ordered date of November 27, 2009 fast approaching and, due to the overriding and compelling need to cover the landfill to eliminate the continuing threat to public health and welfare, the Department took the steps necessary to secure control of the use of funds from the FAM so that vendors could be retained and be paid for the subject closure activities despite Mr. Thibeault's inability or refusal to pay for the work required or provide documentation to the Department that New Ventures was financially unable to do this work. See October 5, 2009 Memorandum of Agreement (the "MOA") between the Department, the Attorney General's office and New Ventures, attached as Exhibit 1, and the October 8, 2009

First Amendment and Second Amendment to the Corrective Action Standby Trust, attached as Exhibit 2.¹ *See also* Carrigan Aff., ¶ 38. As a result, the Department obtained, with the consent of New Ventures through the MOA, the direction and control over the transfer, use and disbursement of FAM funds in order to get the subject work done in the fall of 2009 due to the compelling need to cap the landfill as soon as possible.

15. The FML and landfill gas extraction well installation was completed before the end of November 2009 with MassDEP oversight and approval of the work performed. The drainage piping installation was completed in December 2009. The blasting was partially completed in December 2009. FAM funds were used by the Department to directly pay the contractors pursuant to the October 5, 2009 MOA.
16. New Ventures did not provide the Department with documentation to support New Ventures' claim of financial inability prior to payment of the contractors pursuant to the MOA.
17. As a result of events at the Landfill on Thursday February 4, 2010, the Department again had to consider the use of FAM funds for emergency repairs at the landfill because of New Ventures' claims that it is unable to pay for such repairs. On February 4, 2010, I was informed by New Ventures that the landfill gas flare's blower motor had failed and, as a result, the flare was not operational and would not be returned to service unless the Department authorized the use of FAM funds to make the critical repairs. With the flare shut down, the entire landfill gas collection and pretreatment system was not operational. With the

¹ For unrelated reasons, the Trust Agreement was also amended to change the Trustee from US Bank NA to River Bank.

landfill gas collection and treatment system off, there was no longer a negative pressure gradient under the FML cap pulling gas into the collection system. Landfill gas could not be collected and treated and would escape to the ambient air. This represented an emergency situation and a threat to public health, welfare and the environment.

18. In an email to New Ventures dated February 4, 2010 [Exhibit 3], I informed Mr. Thibeault that the failure of the landfill gas flare was an urgent situation. *See* email correspondence attached as Exhibit 3. The email states in part:

As you know, it is New Ventures Associates, LLC's responsibility under the Final Judgment to properly maintain and operate the landfill gas collection and flare systems. In telephone conversations with me this afternoon, you have represented that New Ventures has no money and therefore cannot pay for the replacement blower, the associated parts, and the invoices associated with Grinnell's work at the landfill for the past few days [Grinnell was a contractor used by New Ventures do maintenance to the landfill gas system] and, as a result, you have requested that MassDEP pay for these items from monies that are held in a financial assurance mechanism (the Trust). You have represented that if MassDEP does not pay for these items, that you would not be able to obtain parts to repair the unit tomorrow and, therefore, the flare would not be operating thru the weekend. Based on your representations and since it is in the public's interest to make and keep the flare operable, MassDEP will take the steps necessary to utilize funds from the Trust under its authority in 310 CMR 19.051. Also, as discussed during our telephone conversations, you are to, as soon as possible, have your attorney, Mr. Nylen, submit a written statement to the Department and Matt Ireland at the Attorney General's office stating, as Mr. Nylen did in his 1/29/10 letter to me and Matt Ireland, that New Ventures has no revenue and is unable to pay for the items referred to here.

See Exhibit 3.

19. On February 5, 2010, New Ventures attorney, Richard A. Nylen, Jr., Esq. of Lynch, DeSimone & Nylen, LLP, submitted a letter to the Department [Exhibit 4] on New Ventures' behalf stating: "The purpose of this letter is to request access to the Financial Assurance Mechanism ("FAM") held by the Department with respect to the costs for the analysis,

repairs, parts, labor, purchase and installation of the blower and motor associated with the enclosed flare at the Landfill and the maintenance of the LFG pretreatment system. ... New Ventures does not have the revenue stream at this time to fund these costs.” See February 5, 2010 letter from New Ventures to the Department, attached as Exhibit 4. Because of the critical need that these emergency repairs be completed to protect the public health and welfare, DEP agreed to amend the October 5, 2009 MOA to authorize DEP to direct the Trustee to disburse FAM funds to pay for the repairs to the landfill gas flare despite New Ventures’ failure to supply documentation regarding its purported inability to pay for such repairs. As of the date of this Affidavit, the MOA has not been amended and no funds from the FAM have been used for such repairs.

20. New Ventures did not provide the Department with documentation to support New Ventures’ claim of financial inability in Mr. Nylen’s February 5, 2010 letter

21. As a result of events at the Landfill on February 25 & 26, 2010, the Department was again asked by New Ventures to consider use of FAM funds for repairs at the Landfill because of New Ventures’ claims that it is unable to pay for such repairs. Mr. Thibeault informed me in a telephone call on the morning of February 26, 2010 that a portion of the FML liner and three (3) gas extraction wells had been damaged during the previous night’s storm event. He stated to me during the call that he would need money from the FAM if we wanted the liner and the wells repaired. In an email exchange between myself and Mr. Thibeault on March 2, 2010 [Exhibit 5], I reminded Mr. Thibeault that “DEP needs to see documentation that New Ventures is unable to pay for the repairs in order to consider use of the FAM funds.” See

email correspondence attached as Exhibit 5. As of the date of this affidavit, no such documentation has been provided to the Department.

22. Mr. Thibeault's attorney, Mr. Nylen, submitted a letter to the Department on New Ventures' behalf on an earlier occasion as well in which he states that New Ventures does not have the revenue to conduct the Landfill closure activities and/or O&M activities required by the Final Judgment. On January 29, 2010, Mr. Nylen submitted a letter to the Department on behalf of New Ventures [Exhibit 6] stating; "As the Department is well aware, the expenses associated with this closure exceeded the projections and there are no revenues coming in to New Ventures at this point. New Ventures would like to continue the discussions that took place between Mr. Chalpin and Mr. Thibeault with respect to accessing the FAM monies for O&M costs and expenses for final closure." *See* January 29, 2010 letter from New Ventures to the Department, attached as Exhibit 6.

23. These letters of January 29, 2010 and February 5, 2010 from Mr. Nylen repeat Mr. Thibeault's claim that New Ventures does not have the money to close the landfill yet the proof requested about New Ventures' financial inability was not provided. When I have expressed my frustration to Mr. Thibeault about his failure since September 2009 to provide the Department with New Ventures' financial information, he has stated to me on many occasions that the Department should use money from the FAM without New Ventures proving that it has no funds since, as he has puts it, we have no choice other than to do so if we ever want the landfill closed.

24. On many occasions during meetings, inspections at the Landfill, in telephone conversations and in voice mail messages since September 2009 and, most recently, on March 11, 2009, Mr.

Thibeault has stated to me that New Ventures does not have the money to pay to close the landfill, operate and/or maintain the landfill gas collection and treatment system and fund the Landfill's post-closure maintenance. In a letter to New Ventures attorney, Mr. Nylen, from the Department dated February 4, 2010 [Exhibit 7], the Department requested that New Ventures provide information about its inability to pay for "O&M or any other expenses associated with the landfill closure..." See the Department's February 4, 2010 letter to New Ventures attached as Exhibit 7.

25. Although it is essential for the New Ventures to verify its claims of financial inability, such documents if provided in response to the Department's February 4, 2010 letter are not relevant to the question of whether or not New Ventures has failed in whole or in part to take corrective actions or perform its closure obligations pursuant to paragraph 6(a) of the Trust Agreement. The Department requested the financials to verify New Venture's claim that it could not contract for or fund capping and gas well installation work in the fall of 2009 or the emergency landfill gas flare repairs in February 2010. Because this work and these emergency repairs were critical and, if left undone, presented a threat to the public health, welfare and the environment, the Department took control of the disbursement of FAM funds through the MOA executed with New Ventures, despite New Ventures failure to verify its financial inability to perform the work itself. The Department has an overriding obligation to respond to, control and/or eliminate such conditions and problems when a responsible party is unable or unwilling to do so. In the absence of such conditions or situations, however, the terms of the Trust agreement and the FAM provisions of the Solid Waste regulations do not allow the FAM funds to be used by New Ventures [e.g., the Department gives FAM funds

back to New Ventures] so that New Ventures can pay for *all* remaining “routine” Landfill closure work required by the Final Judgment, or to the fund all post closure operation and maintenance activities. The purpose of a FAM created pursuant to 310 CMR 19.051 is to provide the Commonwealth with the funds in the event that a landfill owner and/or operator is in default by failing in whole or in part to perform the required activities to close a landfill or maintain it after closure and the Department must direct disbursement of the FAM funds. A solid waste landfill FAM exists for the protection and benefit of the citizens of the Commonwealth, not a landfill owner/operator.

26. In response to the Department’s February 4, 2010 request for financial information, New Ventures’ attorney, Mr. Nylén, submitted a letter to the Department [Exhibit 8] dated March 5, 2010 in which he states, in part, “...I would like to confirm that any tax returns that are sent to the Department as part of its review of New Ventures’ request for FAM access are not considered public records for the purposes of release to the general public.” See New Ventures February 4, 2010 letter to the Department, attached as Exhibit 8. On March 22, 2010, New Ventures’ attorney, Mr. Nylén, submitted a letter to the Department [Exhibit 9] in which he states in part that New Ventures cannot comply with the Department’s request for financial information without a response to its letter of March 5, 2010. *See* New Ventures March 22, 2010 letter to the Department attached as Exhibit 9.
27. New Ventures’ question about the confidentiality of its tax returns in the March 5 & 22, 2010 letters is not relevant to the issue of the use and control of FAM funds when New Ventures has failed in whole or in part to fund response actions at the landfill. New Ventures’ has repeatedly refused many requests to provide financial information since September 2009.

New Ventures links submittal of its tax records to its assumption that the Department will directly turn FAM funds over to or release FAM funds back to New Ventures so that it can pay for the repairs needed at the landfill and all remaining closure work required by the Final Judgment and post-closure operations and maintenance. New Ventures ignores or mistakenly interprets the provisions of Trust Agreement and the regulatory provisions at 310 CMR 19.051 by requesting that the Department give FAM funds back to New Ventures to pay for the work necessary to comply with the Final Judgment. Pursuant to Paragraph 6(a) of the Trust Agreement, New Ventures' failure and/or inability to fund such response actions constitutes default because New Ventures "has failed in whole or in part to carry out its corrective action, closure and/or post-closure maintenance obligations . . . or has otherwise failed to cure any corrective action, closure or post-closure related condition contained in any notice to [New Ventures] from [MassDEP]." [Trust Agreement, paragraph 6(a).] Upon such a default, paragraph 6(a) of the Trust Agreement authorizes MassDEP to issue a "default notice" and then instruct the Trustee to make payments from the FAM " . . . as [MassDEP] may at that time or thereafter direct in writing," at which point New Ventures shall *"lose all right, title and interest in the Trust Fund property in an amount equal to the cost incurred to perform or have performed all tasks the Department deems necessary to complete proper corrective action, closure and/or post-closure"* work. Trust Agreement, paragraph 6(a) (emphasis added)

28. Mr. Thibeault has also stated to me during several conversations since September 2009 that the Department should release money from the FAM to him so that he can pay contractors to close the landfill since it is his money anyway and he is going to get back the unspent portion

of the FAM when the landfill is closed in the spring of 2010. I have informed Mr. Thibeault on several occasions that the Department feels that the FAM does not have enough money in it to cover the closure and post-closure operation and maintenance costs associated with the Landfill. *See also* Carrigan Aff, ¶ 33-35, 57. In addition, I have informed Mr. Thibeault on several occasions that FAM funds could not be returned to New Ventures until the Department determines that the post-closure maintenance period for the Landfill has expired and that post-closure maintenance and monitoring of the Landfill is completed pursuant to the Solid Waste Regulations [310 CMR 19.051(11)].

29. In a letter dated March 5, 2010 [Exhibit 10], the Department informed New Ventures that the Department has determined that the Standby Trust Account is not adequately funded to cover post-closure costs at the Landfill as required pursuant to 310 CMR 19.051(2)(a). *See* the Department's March 5, 2010 letter to New Ventures, attached as Exhibit 10. New Ventures is required to establish and continuously maintain a FAM that is adequate to assure the Department that New Ventures is at all times financially capable of complying with the closure and post-closure requirements of the Solid Waste Regulations, 310 CMR 19.000. In addition, pursuant to 310 CMR 19.051(2),6(a), New Ventures is required to revise the closure and post-closure maintenance cost estimate annually and to every second year submit the revised cost estimate, with a detailed explanation of its method of calculation, to MassDEP. If the revised closure and post-closure maintenance cost estimate exceeds the funds available in the existing FAM by more than ten percent (10%), 310 CMR 19.051(7) requires that New Ventures increase the existing FAM or establish an additional FAM in amount sufficient to cover the difference between the existing FAM and the revised cost estimate. In 2006, New

Ventures provided MassDEP with revised closure and post-closure maintenance cost estimate proformas that estimated landfill post-closure costs to be \$4,478,400. The current balance for closure and post-closure as of the date of this Affidavit in the Standby Trust Account is approximately \$2,730,252. The March 3, 2010 letter informed New Ventures that the Department determined that the Standby Trust Account is not adequately funded to cover post-closure costs and has not been properly maintained in violation of 310 CMR 19.051(2)(a) and 310 CMR 19.051(7) and, in addition, New Ventures is in violation of 310 C.M.R. 19.051(6) by failing to provide revised estimates that fully and adequately estimate closure and post-closure costs and the amount of increase necessary to fully fund the Standby Trust Account. The letter stated that, to return to compliance, New Ventures must properly fund and maintain the Standby Trust Account.

30. Most recently by letter dated March 3, 2010 [Exhibit 11], MassDEP notified New Ventures that, because it had failed to replace and repair the approximately 1.5 acres of damaged FML and the three (3) gas wells rendered inoperable as a result of the windstorm on the evening of February 25, 2010 or early morning of February 26, 2010, MassDEP may exercise its authority under paragraph 27 of the Final Judgment to access the Landfill Site with contractors and perform the necessary repair work. *See* the Department's March 3, 2010 letter to New Ventures, attached as Exhibit 11. The loss of the FML cap and exposure of the underlying gas vent layer allows precipitation and storm water runoff to infiltrate into the C&D Material and other solid waste inside the Landfill, increasing the risk of landfill gas generation and release, including Hydrogen Sulfide gas releases and nuisance odors. *See also*

Carrigan Aff., ¶¶ 42, 43 and MassDEP March 3, 2010 “Paragraph 27 Notice” letter to New Ventures, attached as Exhibit K to the Carrigan Aff.

31. New Ventures responded to MassDEP’s March 3, 2010 letter with a letter from Mr. Nylén [Exhibit 12] dated March 5, 2010. *See* New Ventures’ March 5, 2010 letter to the Department, attached as Exhibit 12. *See also* Carrigan Aff., ¶ 44 and New Ventures’ March 5, 2010 letter attached as Exhibit L to the Carrigan Aff. In this March 5, 2010 letter, New Ventures states that MassDEP has no authority under paragraph 27 of the Final Judgment to enter the Landfill Site and perform repair work on the damaged FML or gas wells. *Id.* Mr. Nylén also states that, “The purpose of the Standby Trust Agreement is to allow the Department to access monies in extraordinary circumstances such as when New Ventures abandoned the Landfill, refuses to perform work in connection with the closure, or if an imminent threat to health and safety (sic). In this instance, no extraordinary circumstance has occurred”.
32. In a letter dated March 10, 2010 from the Department to Mr. Nylén [Exhibit 13], the Department states that “New Ventures is mistaken. *See* the Department’s March 10, 2010 letter to New Ventures, attached as Exhibit 13. Paragraph 27 of the Final Judgment gives the Department clear and unambiguous authority to access the Landfill to address such conditions as indicated in the italicized text below. Specifically, Paragraph 27 states:

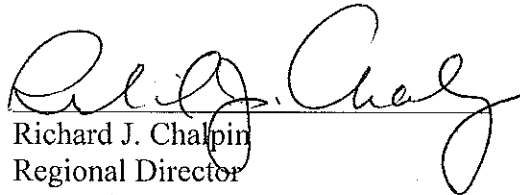
“The Department and its contractors *shall have the right to access the Site at any time and without notice to:* respond to odor complaints; conduct inspections; take air quality readings, leachate samples, or other samples; *secure the continued installation and full operation of the LFG Pretreatment System in the event that the LFG Pretreatment System has been removed, disabled, or otherwise fails,* or if New Ventures has abandoned or stopped operating the LFG Pretreatment System; *secure the continued installation and full*

operation of the enclosed flare, including, without limitation, all piping, gas collection systems, propane tanks, and other components required to operate the enclosed flare; and otherwise inspect the Site or monitor activity to ensure compliance with all terms, conditions, and requirements of this Final Judgment and the Settlement Agreement, as well as with any other applicable administrative enforcement orders issued by the Department.

*... The Department and its contractors shall also, within seventy-two (72) hours of notice by the Department, have the right to access the Site at any time to take actions necessary to: (i) assure that the landfill gas system, including, without limitation, the LFG Pre-treatment System, the enclosed flare, and gas collection system, is operating in full compliance with the performance standards in Appendix B to the Settlement Agreement; (ii) patch, repair, or extrusion weld any FML rips, tears, seam openings or other damage; (iii) cover, patch, or otherwise mitigate any breakouts of hydrogen sulfide or other Landfill gases from the Landfill surface; or (iv) place cover over Active or Inactive Areas of the Landfill in order to assure compliance with the requirements of Sections B and C of Appendix C to the Settlement Agreement, Landfill Cover Protocol. The Department also retains all rights of access to the Site under applicable state and federal law.” *Emphasis added.**

33. As of the date of this Affidavit, New Ventures has not repaired the damaged FML or taken action to replace or repair the damaged gas wells. *See Carrigan Aff. , ¶ 50.*
34. For all the foregoing reasons, the Department respectfully requests that this Court issue an order granting the relief requested in this Motion.

Signed under the pains and penalties of perjury this 25 the day of March 2010.

A handwritten signature in cursive script, appearing to read "Richard J. Chalpin", written over a horizontal line.

Richard J. Chalpin
Regional Director
Massachusetts Department of Environmental
Protection